Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-229

In The

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SELLERS, JR. and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

against

PHILIP D. RUPERT, JR. and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

James M. Hartman
HARRIS, BEACH, WILCOX,
RUBIN & LEVEY
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Counsel for Respondents

Edward H. Fox
HARRIS, BEACH, WILCOX,
RUBIN & LEVEY
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Of counsel

The Daily Record
Rochester, New York
(6395)
Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Preliminary Statement	1
Counterstatement of Facts	3

REASONS FOR DENYING THE WRIT

POINT I — The application of *Gertz* to non-media defendants is not squarely presented by the decision below, since that decision rests upon alternative grounds, including a finding that respondents satisfied the *Gertz* standards in any event	6
POINT II — The decision below correctly determined that the defamatory letter did not contain any constitutionally protected statements of opinion and therefore presents no conflict with the decisions of this Court	15
CONCLUSION	19

APPENDICES

APPENDIX A — Excerpts from motion to dismiss appeal to the New York Court of Appeals, dated January 8, 1979, and Order of the New York Court of Appeals granting the motion, dated March 22, 1979	RA-1
APPENDIX B — Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971	RA-5

TABLE OF AUTHORITIES

Cases:	Page
Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)	18, n. 15
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	15
Cianci v. New Times Publishing Co., No. 80-7030 (2d Cir., July 11, 1980)	18, n. 15, n. 16
Crane v. New York World Telegram Corp., 308 N.Y. 470, 126 N.E.2d 753 (1955)	13, n. 11
Curtis Publishing Co. v. Butts, 388 U.S. 130, *reh. denied*, 389 U.S. 889 (1967)	7, 9, 10
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	*passim*
Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970)	17
Letter Carriers v. Austin, 418 U.S. 264 (1974)	14, n. 12, 16, 17
Moran v. Heast Corp., 40 N.Y.2d 1071, 360 N.E.2d 932, 392 N.Y.S.2d 253 (1976)	7, n.4
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	9, 10
Paris v. New York Times Co., 170 Misc. 215, 9 N.Y.S.2d 689 (Sup. Ct. N.Y. Co. 1939), *aff'd mem.* 259 A.D. 1007, 21 N.Y.S.2d 512 (1st Dep't), *rearg. denied*, 260 A.D. 859, 23 N.Y.S.2d 479 (1st Dep't 1940)	13, n. 11
Rand v. New York Times Co., 184 (27) N.Y.L.J., Aug. 7, 1980, p. 1, col. 6 (2d Dep't)	18, n. 15
Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977)	16
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	8
Time, Inc. v. Firestone, 424 U.S. 448 (1976)	10, 14, n.12

Page

Secondary Materials:

Restatement (Second) Torts, §566 (1977) . . . . . 16, n. 13

United States Supreme Court Rule 17.1 19

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-229

CHARLES J. SELLERS, JR. and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

against

PHILIP D. RUPERT, JR. and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

---

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Preliminary Statement

Petitioners seek a hearing before this Court by characterizing this case as one which raises a basic issue of constitutional law — whether the constitutional limitations on the law of libel set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) apply in a libel suit brought against defendants who are not members of the media.

In support of their contentions petitioners not only mischaracterize the facts and procedural history of this case, but also omit references to the record and opinions below which, if cited, would reveal that this case is not one that should be considered by this Court. On the contrary, the constitutional issues advanced by petitioners were properly not a part of the outcome they now seek to overturn.

Petitioners claim that the *Gertz* issue arises in several contexts. They first assert that the trial court instructed the jury that it could return verdicts for the plaintiffs without finding any degree of fault on the part of defendants with respect to their libels. Not only does the charge support the conclusion that the jury was required to find fault but the courts below also found that petitioners failed to object to the court's instruction on this issue and in fact requested a charge which was substantially the same as the one rendered. Thus the constitutional objections were knowingly and specifically waived. Additionally, the Appellate Division specifically found that there was evidence in the record sufficient to meet "any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." (PA 5).[1] And the jury made four separate unanimous findings of malice in connection with its punitive damage awards.

Petitioners also claim that the New York appellate courts permitted the award of presumed or general libel damages to the individual plaintiff despite the fact that the intermediate appellate court found that that plaintiff suffered no "actual personal damages". What they fail to point out, however, is that this statement was made in support of the court's decision to reverse a $22,000 *special damage* verdict to the individual plaintiff and did not relate to the $200,000 compensatory

---

[1]References to the appendix to the petition for certiorari are designated "PA_____." Similary, references to the body of the petition for certiorari are designated "P_____," and references to the appendix to this brief are designated "RA_____."

damage award, which was supported by ample evidence of injury, as the courts below specifically found (PA 20-21).

In addition, petitioners erroneously state that the courts below specifically found that the damages sustained by the corporation were not caused by the alleged libel or, in the alternative, that the record supports only that conclusion, and that the courts below were therefore wrong in affirming on the question of causation. However, no court has found the lack of requisite causation between the damages complained of and the libelous letter. The jury was specifically charged that it must find that the letter caused the damages (PA 40-41, 47); and the record is replete with support for this position. Petitioners create only an issue of fact which seven jurors and eleven judges have resolved against them.

Finally, petitioners argue that their First and Fourteenth amendment rights were violated because liability was imposed on the basis of constitutionally protected statements of opinion. Contrary to these assertions, the courts below, in reviewing the libelous material, found specifically that the letter in question was not constitutionally protected opinion. Nor were petitioners' comments based upon facts verified, independently or otherwise, by the audience to whom they were addressed.

Because of petitioners' mischaracterizations, respondents submit the following counterstatement of facts.

Counterstatement of Facts

Petitioners characterize this case as one involving the Monroe County Medical Society's consideration of insurance proposals advanced by respondents rather than a lawsuit about defamation and tortious business interference. Despite detailed affirmed findings of fact by the Appellate Division (PA 5-11) petitioners continue to mischaracterize the facts and make conclusory allegations without citation to the record.

This case is one in which the libels of the petitioners injured the reputation of the individual plaintiff and caused substantial business loss to his company. The Monroe County Medical Society had been respondent Rupert and Lutz' best account for over twenty-five years. At the time the events of this lawsuit took place it appeared that Rupert & Lutz would have the account another twenty-five years; but, only four months later they were fired — summarily, without warning, and without explanation. They were fired as a result of a covert campaign by petitioners, misrepresenting respondents to the Medical Society and intentionally and purposefully defaming both plaintiffs.

In December, 1970, respondents gave the Medical Society advice concerning new options with respect to its insurance policies. The Executive Director of the Society, subsequent to the presentation by Rupert & Lutz, wrote petitioner Sellers and asked if he had any "ideas who might be consulted" to evaluate the insurance alternatives raised by the Rupert & Lutz proposal. He wanted somebody with no "ax to grind" or "personal stake" in the matter. Mr. Sellers was not asked to comment upon Rupert & Lutz' handling of the account. From December 1970 through January 1971, however, Sellers wrote a barrage of letters advancing himself and criticizing respondents not only on the issues raised by the Medical Society but on other subjects as well. He predicted disaster if the Medical Society followed the respondents' advice. Included in the Appendix to this brief is correspondence admitted into evidence without objection illustrating the language and tone employed by Mr. Sellers (RA 5-29).

The March 10, 1971 defamatory letter was the culmination of the Sellers campaign to discredit Rupert & Lutz and take away the Medical Society business. In it, among other things, he accused respondent Rupert of failure, of making misstatements, of a parade of blunders, of lacking business ability and of threats and bluffs. (PA 35-38). None of the alleged opinions in that letter

were based on anything other than false information which Sellers had been spoon-feeding the Medical Society for months.

Incredibly, petitioners claim (P 3) that there was no evidence whatsoever that the letter had any bearing on the decision to replace Rupert & Lutz. Not only was this question squarely presented to the jury by the charge of the court, (PA 40-41, 47) but the record abounds with evidence to support independently the requisite finding of causation.[2] Petitioners now would ask this Court to act as an additional reviewer of the facts when the jury and both New York appellate courts have already concluded that the causal link exists between the March 10 letter and respondents' injuries.

---

[2]Dr. Hamilton, contrary to petitioners' assertion, did not terminate Rupert & Lutz. The Board of Directors did. Hamilton may have decided to recommend a change in administrators, but he, Dr. Webster, and Sellers all testified that it was up to the Board of Directors to make that decision. The decision to discharge Rupert & Lutz and Hamilton's recommendation were both made at a meeting the Board held on March 23, two weeks after the Sellers letter in which he specifically requested that the account be transferred to him. Finally, Hamilton admitted that he could not be certain whether or not he had seen Sellers' letter of March 10 prior to preparing his report to the Board of Directors. There was no evidence to the contrary.

REASONS FOR DENYING THE WRIT

POINT I

The application of *Gertz* to non-media defendants is not squarely presented by the decision below, since that decision rests upon alternative grounds, including a finding that respondents satisfied the *Gertz* standards in any event.

Among the many issues raised by petitioners before both New York appellate courts (but never raised in the pleadings, at trial, or in any proceeding prior to appellate review) was that the unanimous jury verdict against them violated the standards set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), regarding the fault standard applicable in defamation cases and the necessity of proving "actual damages" absent a finding of "actual malice." Relying upon the New York Court of Appeals' statement in its memorandum decision that "[d]efendant's remaining contentions have been examined and found to lack substantial merit" (PA 1-2), petitioners contend that "the Court of Appeals thus passed on the merits of petitioners' constitutional contentions" (P 8)[3] and that this case therefore presents "a uniquely attractive opportunity" (P 18) to determine whether *Gertz* applies to purely private defamation actions.

This argument, however, distorts the decisions of the courts below. Although a majority of the Appellate Division, Fourth Department expressed the view that it would be inappropriate to apply *Gertz* to this case (PA 4-5), the court did not affirmatively rule on the constitutional issue, but instead rested its decision upon alternative grounds indicating that the jury verdicts were

---

[3]The Court of Appeals had previously granted respondents' motion to dismiss petitioners' appeal as of right, on the ground that "no substantial constitutional issue is directly involved." 46 N.Y.2d 1074 (1979) (RA 4).

proper even within the constitutional framework of *Gertz*.[4] Since the memorandum affirmance by the New York Court of Appeals also cannot be read as having decided this constitutional issue, the applicability of *Gertz* to private defamation cases is not implicated by the decision below and a writ of certiorari is totally unwarranted.

The first of these alternative grounds, and one addressed specifically by both the Appellate Division and the Court of Appeals, is that petitioners waived any objection to the trial court's charge on liability by failing to raise that issue at the time of trial. (PA 1, 4). Petitioners have attempted to invoke this Court's jurisdiction by misleadingly suggesting that a substantial constitutional issue has been raised as to whether they could or did waive their constitutional rights.

The finding of waiver by both the Appellate Division and the New York Court of Appeals is so firmly supported by both the facts and by principles of constitutional law that the propriety of that holding is beyond dispute. First, it is clear that constitutional objections, even those based on First Amendment rights, may be waived by failing to raise them at a proper time. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967). Petitioners have argued, however, that any such waiver must be "knowing and intelligent", citing *Curtis Publishing Co.* Not only does that case not adopt such a standard, but this Court has also stated: "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defen-

---

[4]The Appellate Division majority merely concluded that it was not the function of an intermediate appellate court to decide constitutional issues " 'unless their consideration is necessary to the disposition of the individual case.' " (*quoting Moran v. Hearst Corp.*, 40 N.Y.2d 1071, 1072 (1976)) (PA 5). The majority then added that "there is evidence in the record sufficient to meet any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." *Id.*

dant in order to preserve a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973).

The record in this case overwhelmingly demonstrates that petitioners did indeed knowingly and intelligently waive their constitutional objections. *Gertz* was decided almost *two years* before the trial of this action, yet defendants made no reference to that case or to the constitutional theory it embodies at any time during the trial. Further, as the New York Court of Appeals indicated, "defendant not only failed to object to the court's instruction, but in fact requested a charge which was substantially the same as the one rendered." (PA 1).[5] It is difficult to

---

[5]Defendants requested that the court charge the jury in pertinent part as follows: "This is an action to recover damages for libel. A libel is a publication or writing which tends to disgrace or discredit a person in the community. If a publication charges a professional person with general incompetence, lack of character or total disregard of professional ethics damages may be recovered without showing the publication caused financial loss to the plaintiff. If, however, the publication only charges specific instances of ignorance, mistake or impropriety on the part of the plaintiff, he may not recover unless he proves that the article was a substantial factor in causing him financial loss. . . . In the defendant's letter of March 10, 1971, it is the defendant's claim that the facts set forth therein are true. . . ." (PA 103).

On the issue of liability, the trial court charged the jury in pertinent part: "Libel is a publication in writing which tends to disgrace or discredit a person in the community. . . . Now, if a publication charges a professional person with incompetence, damages may be recovered without showing that the publication caused any specific financial loss to the plaintiff. If you find that the letter of the defendants as understood by those who received it, and read it, did disgrace the plaintiffs' reputation, or discredit them in the community, your verdict will be for the plaintiffs. If you find that the letter did not disgrace plaintiffs, or discredit them in the community, then your verdict will be for the defendants.

"Defendant contends that the written statement it is charged with making is in fact true. . . . If you find that the statement differed in substantial respect from the truth, your finding will be for the plaintiff on this issue." (PA 40-42).

imagine a more "knowing and intelligent" decision not to assert a questionable constitutional defense, and petitioners should not now be permitted to use that decision as an avenue of access to this Court.

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), upon which petitioners rely, stands in sharp contrast to the record presented here. Unlike the present case, where the principles of *Gertz* were well established at the time of trial, the claim of waiver rejected in *Curtis Publishing Co.* was based upon the defendant's failure to raise the constitutional standard of "actual malice" as a defense to a libel action *before* that standard was clearly enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Since petitioners here can claim no similar uncertainty in the law, the finding of waiver of their constitutional objections by the courts below offends no constitutional provision and presents no substantial issue for review by this Court.

An even more compelling reason for denying a writ of certiorari in this case is that the *Gertz* standards with regard to fault have been fully satisfied. Speaking for the entire Appellate Division on this point, the concurring justice concluded that the numerous punitive damage awards[6] were predicated upon a finding of "actual malice," i.e., reckless disregard for the truth. (PA 16). Even *Gertz* does not require so stringent a showing in defamation actions involving private plaintiffs (418 U.S. at 347), and the punitive damage awards therefore satisfy any conceivable constitutionally mandated fault standard.

Petitioners contend, however, that the findings of malice implicit in the punitive damage awards cannot support a consti-

---

[6]The trial court charged on the issue of malice not only in connection with punitive damages under the libel count (PA 44-46), but also regarding the defense of qualified privilege (PA 43-44) and punitive damages on the tortious interference count (PA 48-50).

tutional determination of fault because the trial court's charge contained isolated references to "personal spite" or "ill will." As the Appellate Division stated, however, (and as the New York Court of Appeals necessarily concluded as well), the charge, *read as a whole,* instructed the jury that punitive damages could only be predicated upon a finding that defendants acted in reckless disregard for the truth. (PA 16).

In this regard, the decision below finds ample support in *Curtis Publishing Co. v. Butts, supra.* In that case, the trial court's charge on punitive damages defined malice to include not only "wanton or reckless indifference or culpable negligence" but also "ill will, spite, hatred and intent to injure one." 388 U.S. at 165-66 (concurring opinion of Warren, C.J.). This Court, however, concluded that the punitive damage award was sufficient to satisfy the *New York Times* test for "actual malice," stating:

> The impact of a jury instruction "is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied." • • •
>
> • • •
>
> Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth," or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

388 U.S. at 156-57 (citation and footnote omitted).

It is equally obvious here that the trial court's charge on punitive damages permitted a finding of malice only if the jury concluded that the defendant acted with knowledge of falsity or

reckless disregard for the truth. That was the only theory actually submitted to the jury, or that plaintiffs ever relied upon, and the greater part of the court's various charges on the issue of malice was devoted to a careful explanation of the meaning of "reckless disregard."[7]

Not content to rest upon this ground alone, the Appellate Division majority also reviewed the record and made its own independent finding of fault to satisfy the *Gertz* standard, stating: "[T]here is evidence in the record sufficient to meet any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." (PA 5). As this Court has stated, the finding of fault necessary to satisfy constitutional limitations in defamation cases need not be made by the jury, but may be made in the first instance by an appellate court. *Time, Inc. v. Firestone*, 424 U.S. 448, 461-62 (1976). Since that finding is undeniably supported by the record,[8] as the New York

---

[7]The charges states, in part: *"In proof of malice plaintiff claims that the defendant published its statement without any reason to believe in their truth,* and refused plaintiff's request that it cease making such statement.... If you find that defendant's source was not trustworthy, or that defendant did not rely upon the claimed source, or acted recklessly in relying upon a claimed source, or the information received by defendant did not intend to establish the truth of the charges defendant made, or that defendants' statements did not fairly, accurately and completely state the information received, you may, if on consideration of all of the evidence, you deem it proper to do so, find that the defendant acted with malice...." (PA 45) (emphasis added).

[8]As the concurring justice in the Appellate Division stated for the entire court: "The totality of the onslaught was such that the jury could have found malice from the sheer number of misrepresentations. Defendant Sellers' extensive writings and conversations with the Medical Society and the Continental plainly attacks the plaintiffs' professional and personal competence, their honesty, leadership of their own agency, the financial stability of the agency, and its relationship with other groups and the advice, counseling and service they had rendered to the Medical Society for a period of over 25 years. The letter of March 10, 1971 clearly libels plaintiffs in these

Footnote continued on next page—

Court of Appeals obviously concluded, the decision below does not conflict with any decisions of this Court and presents no substantial constitutional issue for resolution.

Even more misleading is petitioners' attempt to raise a constitutional issue concerning the "presumed damages" aspect of *Gertz*, by arguing that the Appellate Division found no evidence of any "actual personal damages" to Rupert. Indeed, petitioners out-of-context quotation of that phrase from the Appellate Division opinion is a shocking distortion and misrepresentation of the facts and of the decisions of the courts below. Even a most cursory reading of the Appellate Division decision reveals that the court used the phrase "actual personal damages" solely in connection with its decision to reverse the *special damage* award to Rupert personally. (PA 21). It therefore embodies only the conclusion that Rupert suffered no out-of-pocket financial loss as a result of petitioners' libelous statements, and not that he suffered no personal injury of any kind. As this Court stated in *Gertz:*

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish

---

—Footnote continued from preceding page

respects. Undeniably persuasive to the jury was the fact that all these machinations were accomplished while Sellers held himself out as an independent consultant motivated by concern for plaintiffs when, in reality, as revealed at the trial, he was acting covertly out of a desire to further his own business interests, keeping plaintiffs in the dark until it was too late to defend themselves." (PA 16).

A number of Sellers' previous letters, which were properly before the jury without objection on the issue of malice, are contained in the Appendix to this brief. (RA 5-29).

> and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

418 U.S. at 349-50.[9]

The trial court's charge on damages accorded with these principles,[10] and with New York law, which also requires evidence of actual injury as a basis for defamation damage awards.[11] Both the Appellate Division (PA 20) and the Court of Appeals (A 1) found ample and convincing evidence in the record to support the jury's assessment of damages, a determination

---

[9] *Gertz* also states that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Since both the jury and the Appellate Division have made the requisite finding of "actual malice," the *Gertz* limitation on presumed damages is inapplicable in any event to this case.

[10] The charge states, in pertinent part: "If you find that plaintiffs are entitled to recovery you will award them such amount as in the exercise of your good judgment and common sense you find is fair and just compensation for the injury to plaintiffs' reputation and business, and the humilation and mental anguish in their public and private lives, which you find was directly and actually caused by the defendants' actions. In fixing that amount you should consider plaintiffs' standing in the community, the nature of defendants' charges against them, the extent to which the statement was circulated, the tendency of the statement to injure such a person as plaintiff, and all of the other facts and circumstances surrounding the parties. Such damages cannot be fixed with mathematical accuracy. Fair compensation may vary from nominal damages of one dollar, if you find the injury to have been negligible, to a substantial sum, if you find the injury to have been substantial." (PA 46).

[11] *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 476 (1955); *Paris v. New York Times Co.*, 170 Misc. 215 (Sup. Ct. N.Y. Co. 1939), *aff'd mem.*, 259 A.D. 1007 (1st Dep't), *rearg. denied*, 268 A.D. 859 (1st Dep't 1940).

that is reviewable in this Court only in extraordinary situations.[12]

The New York Court of Appeals correctly concluded that "no substantial constitutional issue is directly involved." (RA 4). Both the Appellate Division and the Court of Appeals found that petitioners waived their right to assert such objections and that, even if *Gertz* applied to this case, its standards were fully satisfied. Since the record in this case so overwhelmingly demonstrates the correctness of these holdings, no constitutional issues are legitimately implicated by the decision of the court below and the writ of certiorari should not be granted.

---

[12]The sufficiency of the evidence in support of the damage verdict is plainly a question of fact within the province of the state courts. Although this Court is not precluded from reviewing such factual issues where important constitutional questions are involved (*see Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974)), "[e]ven where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here." *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

Pettioners also contend that the special damage award to Rupert & Lutz raises the same "presumed damage" issue because, in their view, the record does not show that the March 10, 1971 letter caused the loss of the Medical Society account. This causation issue is also in question of fact and has been resolved against petitioners by a jury and by two appellate courts, and offers no basis for constitutional review in this Court.

POINT II

The decision below correctly determined that the defamatory letter did not contain any constitutionally protected statements of opinion and therefore presents no conflict with the decisions of this Court.

In attempting to persuade this Court to grant certiorari on the opinion issue, petitioners place heavy emphasis on the statement in *Gertz* that:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-40. However important this principle might be, petitioners have purposefully ignored the fact that it serves only as a preamble to the constitutional principle for which *Gertz* truly stands:

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

418 U.S. at 340. On the record before them, the New York courts had no choice but to conclude that the March 10 letter did not contain constitutionally protected opinions, a determination that is fully in accord with the decisions of this Court.

Petitioners contend that the trial court committed an error of constitutional proportions by failing to charge the jury that opinions are not actionable. Yet as petitioners conceded in the

court below, whether a particular statement constitutes fact or opinion is a question of law to be decided by the trial court in the first instance. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, *cert. denied*, 434 U.S. 969 (1977). *See also Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974). In refusing to charge the jury on the opinion issue, the trial court simply exercised its proper function and necessarily concluded that the March 10 letter contained no constitutionally protected opinions.

Petitioners rely exclusively upon the characterization of the March 10 letter by Justice Cardamone in the Appellate Division as a "mixture of opinion and fact," (PA 17) and that the letter "was not constitutionally protected as a statement of opinion only." *Id.* From this, petitioners argue that both the Appellate Division and the Court of Appeals regarded some statements in the March 10 letter as constitutionally protected opinions. Petitioners, however, have once again misleadingly omitted the crucial portion of the Appellate Division's determination on this issue: "Since the letter of March 10, 1971 itself and defendant's testimony are all to the effect that Sellers had opinions backed up by hard facts and concrete evidence, the letter was not constitutionally protected as a statement of defendant Sellers' opinion." (PA 17). In affirming, the New York Court of Appeals necessarily agreed that no constitutionally protected opinions were involved.

To the extent that the Appellate Division found "opinions" in the March 10 letter, it also recognized that these opinions purported to have a factual basis. (PA 17). This case therefore falls within the rule established by the New York Court of Appeals in *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 639, *cert. denied*, 434 U.S. 969 (1977), that statements of opinion are entitled to constitutional protection only where "the facts supporting the opinions are set forth." *Id.* at 380.[13] Since the

[13]This rule finds its source in the Restatement (Second) Torts §566 (1977). Although this Court has had no occasion to consider the Restatement rule, its validity is not an issue before this Court since petitioners have relied upon it both in their requests to charge at trial (PA 103) and on appeal.

March 10 letter was not based upon facts known to the recipients, the decision below correctly applied the constitutional standards set forth in *Rinaldi*.[14]

Furthermore, this Court has never extended constitutional protection to statements such as those found in the March 10 letter. In that letter, Sellers accused Pete Rupert of "threats," "bluffs," and "misstatements," (PA 37) and concluded by asserting: "Failure is a proven fact." *Id.* Certainly, such an assertion from Sellers' own pen carries with it his admission that he did not intend that his statements be regarded as mere "opinions." The overall tenor of the entire letter is nothing more than a factual representation of Rupert & Lutz' performance and a factual statement about Pete Rupert's competence.

By contrast, the statements to which this Court has extended constitutional protection are of an entirely different nature. Although such accusations as "scab" and "traitor" (*Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974)) and "blackmail" (*Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970)) have been held to be protected opinions, in each case it was emphasized that the terms were used "in a loose, figurative sense" (*Letter Carriers*, 418 U.S. at 284) or as "rhetorical hyperbole" (*Greenbelt*, 398 U.S. at 14), and that the reader or recipient therefore would not perceive them as factual

---

[14]The contents of the March 10, 1971 letter are neither based upon disclosed facts (e.g., "There are so many things he needs and doesn't have to do the job that it would take me two pages to list them," "Pete's parade of blunders") (PA 36, 37), nor on facts known to the recipients. Dr. Hamilton testified that all his anti-Rupert & Lutz information came from Sellers, and Sellers admitted he was the source of the society's anger at Rupert & Lutz.

Alternatively, petitioners argue that Sellers' "opinions" were based upon "facts" that he had previously revealed to the Medical Society. It would be an odd constitutional doctrine indeed that would permit an individual to obtain immunity for his "opinions" on the basis of his own previous lies, accusations, and defamatory remarks.

and literal accusations.[15] Since the language of the March 10 letter was neither "loose" nor "rhetorical", but was intended as a factual statement, it is utterly unworthy of constitutional protection under the standards already announced by this Court.

More important, petitioners ask this court to read each sentence in the March 10 letter in isolation, and to classify it as either "fact" or "opinion". To do so would be to rob the letter of its intended meaning and to distort the true impact of the communication on respondents' reputations. The March 10 letter is not a series of independent statements; it is itself one complete statement, factual in tone, and intended to destroy respondents' reputations with the Medical Society. Certainly the Constitution does not permit an individual to immunize himself from liability simply by adding "I think" or "in my opinion" to otherwise defamatory statements especially when he fully intends the recipient to accept his "opinions" as true statements of fact.[16] A simple reading of the March 10 letter is sufficient to demon-

---

[15] *See also Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The court there concluded that such expressions as "fascist," "radical right," or "deceiver" constituted only "loosely definable, variously interpretable statements of opinion." *Id.* at 895. But accusations that plaintiff had lied about and libeled several people were held to be unprotected assertions of fact. *Id.*

In an interesting opinion by Judge Friendly, the Second Circuit has recently concluded that *Greenbelt* and *Letter Carriers* both stand for the proposition, which is fully applicable to this case, that the First Amendment does not protect an "opinion" when it is laden with factual content and charges a crime or serious misconduct. *Cianci v. New Times Publishing Co.*, No. 80-7030 (2d Cir., July 11, 1980).

Petitioners also rely upon *Rand v. New York Times Co.*, 184 (27) N.Y.L.J., Aug. 7, 1980, p. 1, col. 6, (2d Dep't) where the Appellate Division, Second Department, held that statements that plaintiff had "f--d over" or "screwed" his client were not actionable. However, the court emphasized that the statements were merely "rhetorical hyperbole" and "not to be taken literally," and added that, had the statute of limitations not expired, plaintiff could have maintained an action on the basis that the "opinions" purported to be based upon false assertions of fact. *Id.* at p. 22, vol. 3.

[16] *See Cianci v. New Times Publishing Co., supra* n.15, slip op. at _____.

strate that this case does not offer a "uniquely attractive opportunity" to enunciate general standards regarding the constitutional protection of statements of opinion.

CONCLUSION

The Rules of this Court state that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." U.S. Sup. Ct. R. 17.1 This case presents no substantial constitutional issues. The decision below did not attempt to resolve the question of the applicability of *Gertz* to purely private defamation cases. Both the Appellate Division and the New York Court of Appeals concluded that th *Gertz* standards were fully satisfied and that petitioners had knowingly and intelligently waived their right to assert these objections. The decision below also does not conflict with the decisions of this Court regarding the constitutional protection of opinions. The petition for a writ of certiorari to the New York Court of Appeals should therefore be denied in all respects.

Dated: September, 1980

Respectfully submitted,

James M. Hartman
HARRIS, BEACH, WILCOX,
RUBIN & LEVEY
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Counsel for Respondents

Edward H. Fox
HARRIS, BEACH, WILCOX,
RUBIN & LEVEY
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Of counsel

APPENDICES

APPENDIX A
EXCERPTS FROM MOTION TO DISMISS APPEAL DATED JANUARY 8, 1979

[Caption Omitted]

NOTICE OF MOTION TO DISMISS APPEAL

PLEASE TAKE NOTICE that upon the annexed affidavit of James M. Hartman, Esq., sworn to January 8, 1979, the order of the Appellate Division, Fourth Department, entered in the office of the Clerk of said Court on December 15, 1978, unanimously affirming the jury awards herein appealed from, the opinion of said Court, and the memorandum of respondents submitted herewith, the undersigned will move this Court at a stated term thereof, appointed to be held at the Court House of the Court of Appeals in the City of Albany, New York, on January 22, 1979, at two o'clock p.m. on that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein taken "as of right" by appellants on the grounds that no appeal as of right lies in this case because there was no dissent, no reversal or modification in favor of respondents and no direct involvement of the construction of the constitution of the state or of the United States.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b) and 2103(b)(2), you are required to serve answering papers, if any, upon the undersigned at least five (5) days before the return date of this motion, if served by hand, and eight (8) days before the return date of this motion, if served by mail.

Dated: January 8, 1979

[Names of counsel omitted]

APPENDIX A
Excerpts from Motion to Dismiss Appeal
Dated January 8, 1979

[Caption omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL

State of New York
County of Monroe SS.:
City of Rochester

James M. Hartman, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the courts of this state and am a member of the firm of Harris, Beach, Wilcox, Rubin and Levey, attorneys for plaintiffs-respondents.

2. I prepared and tried as well as argued the appeal in this case and am fully familiar with the facts and proceedings heretofore had in it.

3. This affidavit is made in support of our motion to dismiss the appeal taken "as of right" to this Court by appellants. We assert there is no question which directly involves "the construction of the constitution of the state or the United States".

4. Our legal arguments are set forth in the attached memorandum. This affidavit will briefly recite the procedural history of the case as it is relevant to this motion.

5. Respondents (Rupert) sued appellants (Sellers) in 1972 for libel, slander, tortious interference with business and New York Insurance Law violations. Sellers then commenced an action against Rupert and others for libel and conspiracy. These actions were consolidated for trial.

6. The actions were tried over a total of five weeks before a jury in 1977. Some of Rupert's defamation claims and Sellers' conspiracy cause of action were dismissed at trial. The jury

APPENDIX A
Excerpts from Motion to Dismiss Appeal
Dated January 8, 1979

returned ten separate verdicts (based on written questions) for Rupert on libel and interference with business, including awards for general, special and punitive damages. Sellers' libel claim and Rupert's Insurance Law claim were no caused.

7. Sellers appealed. The Fourth Department affirmed the libel verdicts (with one exception) and reversed the interference verdict as well as certain of the interest awards. There was no dissent. The order and opinion, copies of which are attached as Exhibits A and B, were unanimous in affirmance.

8. Sellers filed a Notice of Appeal with this Court, a copy of which is attached as Exhibit C, claiming he is entitled to an appeal as of right under CPLR 5601 (b)1.

9. We respectfully submit that no appeal as of right lies from the unanimous affirmance.

10. This is a defamation case involving private individuals and non-public issues. The facts are amply set forth in the Fourth Department's opinion.

11. We respectfully ask this Court to dismiss the appeal. The jury unanimously found Sellers and his company to be malicious libelers. The Fourth Department unanimously agreed. Mr. Sellers should finally, after seven years of litigation, be held accountable.

/s/JAMES M. HARTMAN

[Jurat omitted]

APPENDIX A
ORDER OF THE NEW YORK COURT OF APPEALS GRANTING THE MOTION, DATED MARCH 22, 1979

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of March A.D. 1979.

Present, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

---

4 Mo. No. 72

Philip D. Rupert, Jr., and
Rupert & Lutz Agency, Inc.,

Respondents,

vs.

Charles J. Sellers, Jr., and
Charles J. Sellers and Co., Inc.,

Appellants.

A motion having heretofore been made upon the part of the respondents to dismiss the appeals taken by the defendants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and said appeals dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX B
CORRESPONDENCE BETWEEN CHARLES J. SELLERS, JR. AND THE MONROE COUNTY MEDICAL SOCIETY, DECEMBER 15, 1970 THROUGH NOVEMBER 30, 1971

December 15, 1970

Mr. Charles Sellers
Charles J. Sellers & Company, Inc.
1230 Rand Building
Buffalo, New York 14203

Dear Charlie:

After meeting with you, the Medical Economics Committee of the Monroe County Medical Society met with Mr. Philip Rupert regarding a number of proposals which he has in front of us. The committee is somewhat confused and there are a number of issues for which they do not have proper insurance counsel. Any insurance counselor seems to me to have an axe to grind in that he represents insurance interests in which he has a personal stake.

I know you have enjoyed a relationship with the Erie County Medical Society and wondered if you had any ideas who might be consulted for insurance benefits that the Rupert & Lutz Agency might provide or propose. Enclosed is a report made to the Medical Economics Committee by Mr. Rupert to give you some idea of their thinking.

We would appreciate your comment.

Sincerely yours,

MEDICIAL SOCIETY OF THE COUNTY OF MONROE, INC.

/s/DONALD M. IRISH
Executive Director

DMI/p
Enclosure

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

December 28, 1970

Mr. Donald Irish, Executive Director
Medical Society of the County of Monroe, Inc.
1441 East Avenue
Rochester, New York 14610

Dear Don:

Thank you for your letter of December 15 concerning the proposals recently submitted to your Medical Economics Committee.

You are quite correct that there are many problems in insurance counselling. There are really no insurance counsellors to my knowledge who know anything whatsoever about the highly specialized field of professional association group plans. Almost all "counselling" is done in the commercial and industrial market.

Concerning the matter of "personal interest", this could become a problem. It has never been a problem for our office, however, in all the years that we have been the official consultant to the Eighth District Branch M.S.S.N.Y. The reason we believe we have not had any problems is because we have always administered our groups with the physicians' interests held paramount. In the long run, we consider this to be our own enlightened self-interest. I am certain that this has been the largest single factor in the phenomenal growth of our Agency.

We serve in the Eighth District without fee. We consider the honor conferred to be more than adequate compensation for the position. We would be willing to serve in an identical capacity

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

for your Monroe County Medical Society if this be the pleasure of the Society.

Based upon the above thinking, our comments on the Rupert & Lutz report are attached. I have tried to be brief. I would ask for the privilege of supplementing this report verbally at your next meeting. I would like to amplify the reasons for my recommendations. I would also like to answer any questions that any committee member wishes to pose. In making my written report as brief as possible, there is naturally much more to discuss.

Sincerely,
CHARLES J. SELLERS & CO., INC.
/s/ CHARLES J. SELLERS, JR.

CJS,Jr/cm
Att.

February 11, 1971

Dr. John G. Hamilton
Chairman, Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

RE:
Monroe County Medical Society—
Accident & Health Group Plan
Commercial Insurance Co.

Dear Dr. Hamilton:

Last Tuesday evening (February 9th) you asked me to write to you confirming the rights of Monroe County Medical Society Member-Physicians in re the guaranteed renewability con-

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

version. Please be advised that every physician who does not convert to guaranteed renewability in an optional or voluntary conversion will, at a later date, have an opportunity to convert rather than lose his coverage, should the loss experience make this necessary.

This is what I advised you would be the case last Tuesday night. I have re-confirmed this with the head of the Group Department, Assistant Secretary John Gaertner.

I would also like to advise you that the Commercial Insurance Company is *not* about to cancel Monroe Medical Society. You are not faced with an ultimatum from this company that you must convert all of the physicians in a compulsory blanket re-write program, no matter what Mr. Rupert's letter appears to say.

It will not, therefore, be necessary for you to consider other companies at this time. To do this could, in fact, react to your detriment, since it might shake the credibility of present insureds in the future of your Group Program, similar to a "run on the bank".

After my conversation by 'phone with the head of the Group Department, the company agreed to the following:

To insist that Mr. Rupert cease and desist from any further promotion of Mr. Arden's National Association of Residents and Interns Program through Mr. McKendry's franchise in the Physicians' Planning Service. Mr. Rupert will be instructed specifically on the method of a voluntary or optional re-write program. I also believe that the company will express the thought in the letter to Mr. Rupert that the company considers Monroe County Medical Society to be a valued client of many years standing.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

I am certain that we would all like to aid Pete Rupert in keeping all the business that he can in his agency. I have agreed with the company that our Agency would not make any personal efforts to displace Rupert & Lutz as your Administrators. While our Agency has over the years developed many friends in the profession, we have not contacted a single one and asked for assistance in displacing Mr. Rupert. We will not do this.

We do, however, feel that the Society should know what the company position would be if you decided to terminate Rupert & Lutz as Administrators. I asked if the Society, having more than ample cause in our opinion, decided that they wished to transfer Administrators, would the company recognize a transfer of the endorsement by the Society? The answer I received from the company was that the company would recognize such a transfer by the Society.

I believe that at our meeting last Tuesday evening both you and Dr. Webster stated your belief that all insured physicians now paying $220.00 per year would strongly resist paying $440.00 for the same amount of coverage, whether it was guaranteed renewable or not. I concur in this opinion. This doubling of the cost that the compulsory blanket re-write would mandate seems to me to be an overwhelming reason to reject this approach.

Sincerely yours,
CHARLES J. SELLERS & CO., INC.
/s/CHARLES J. SELLERS, JR.

CJS,Jr/bb.

cc/Robert C. Webster, President
Monroe County Medical Society
Mr. Donald Irish, Executive Director
Miss Evelyn J. Mickles, Assistant to Mr. Irish

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

February 22, 1971

Dr. John G. Hamilton, Chairman
Medical Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

Dear Dr. Hamilton:

While in New York, I gave to Don Irish copies of some of our file relating to the Physicians Planning Service Corporation. Mr. Clifford F. McKendry is the Franchise holder in Rochester for the Physicians Planning Service Corp. This is the Agency of which Mr. George Arden is President while simultaneously being the Executive Director of his National Association of Residents and interns. On a separate sheet, attached, you will find listed many of his Associations and Group Plans of coverage which compete with many Monroe County Medical Society endorsed Group Plans.

It is difficult to understand why Mr. Rupert cannot see the conflict of interest in hiring Mr. McKendry and associates.

It would thus seem that introducing Mr. McKendry into the Physician's office under a guise of representing Rupert & Lutz gives all of these appointees of Mr. McKendry a quasi blessing from Monroe Medical. It is my understanding that Pete Rupert has been advised by you to terminate the McKendry relationship. He has also been so advised by the Company underwriting your Group Plan. It now appears that on February 10th Mr. Rupert states that *if you object*, he will terminate McKendry. One must wonder how many times Mr. Rupert must be told in

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

order for him to understand what he should know in the first place without anyone telling him.

In order for any Group Plan of Disability Insurance to remain viable, it must receive the nourishment of new, young, healthy participants. The curve of disabilities, as you well know, rises rapidly with advancing age. As each year passes, all of us become one year older. In order, therefore, to keep a Group from becoming top-heavy with higher age participants, it is axiomatic that we must constantly add new, young, healthy members lest our loss experience mount to the danger point.

I will write you further on this matter. I did think you would like to have for your present file the information enclosed about the Physicians Planning Service.

Sincerely,
CHARLEY
s/ Charles J. Sellers Jr.

CJS, Jr/w
Encls.

cc: Mr. Don Irish
Dr. Robert C. Webster, Pres.

P.S. Also enclosed please find a notice wherein the Mass Casualty presents to "The Members of The Medical Society of the County of Monroe Inc." an individual Plan of Insurance. Casual reading of this might mislead a physician into thinking that he is purchasing a Medical Society program that has been sponsored and endorsed by the Society. This should have been immediately clarified by Rupert & Lutz to protect Monroe Medical Group Plan from being raided of new, young, healthy participants.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

February 24, 1971

Dr. John G. Hamilton, Chairman
Medical Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

Dear Dr. Hamilton:

Monday, Don Irish 'phoned me asking for clarification on the February 10th letter of Philip D. Rupert, Jr. Specifically, the matter of a so-called "automatic", or mandatory, conversion, triggered by a 63% loss ratio.

Once again Mr. Rupert's statement is not correct. He is inferring that a 63% loss ratio means the Company is losing money. This is ridiculous. In fact, the Company would be delighted if they could maintain a 63% loss ratio.

The essential problem in Monroe County Medical is that the loss ratio is mounting because the Rupert & Lutz Agency have not nourished the Group with new, young, healthy participants. The Physicians have purchased their coverage elsewhere. This is why Mr. Rupert seems determined to acquire your help in forcing rate increases of up to $200.00 per year on a $100.00 weekly policy ($300.00 per year on $150.00 weekly).

I have been quite reluctant to hurt Mr. Rupert, and I still am. I do feel, however, that my prime loyalty lies with the Society and not with Mr. Rupert. It is obvious to me from the tone of his letter that young Mr. Rupert is not about to go to work and correct this situation. He has had over two years to do so. He obviously has failed. His solution to hire Mr. McKendry is a last desperate effort to rectify a problem he cannot solve himself.

APPENDIX B

Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

Our Agency worked long and hard in obtaining an excellent enrollment result for the new Guaranteed Renewable policy in the Seventh District, *starting in September of 1968.* Many new, younger age Physicians made the Seventh and Eighth District Branch Groups provide acceptable loss experience for the underwriting company. These new, young members have helped balance the higher age Physicians.

You are under no edict for "automatic" conversion at any loss ratio figure. What is more tragic, it seems to me, is that Mr. Rupert has no intention of giving Monroe Medical his wholehearted support in a voluntary, or optional, conversion enrollment. I believe he will go through the motions of a mailing or so, perhaps make a few 'phone calls, and then inform you that since your loss ratio is well over 80%, that the Company must force you into a blanket rewrite with heavy increases in rates for the over age 60 Physicians.

To preserve peace in the family, since both Rupert and myself are Continental agents, I have made excuses for him for years and have tried to cover up his inadequacies. Now that you have expressed, however, the possibility of securing a new company, it makes it possible for me to request your Society to transfer the endorsement from the Rupert & Lutz Agency to our Agency.

Quite frankly, today I know that I can rectify the problem. We have the staff, the knowledge, and the equipment to bail your Society out of this situation. If, however, Mr. Rupert is permitted to continue to let the Group deteriorate to the point where the Company must force a mandatory conversion, we will be powerless to help you.

In essence this problem has been a long time developing. Rupert & Lutz have had internal problems. The President of the

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

Agency, as you know, Bob Lewis, severed all relations with Pete Rupert about a year ago. Since that date, in my opinion, the Agency has operated without capable leadership and your Group has deteriorated.

At the present time our Agency would still be willing to pay Mr. Rupert a substantial sum for his interest in the Monroe County Medical Society Group Plan Accident & Sickness coverage. We know that we can revitalize the Group if we act immediately. The next Group enrollment date is June 8th and if action is to be taken, this should be, ideally, done during the month of March so that our Agency could plan and produce an optional, or voluntary, conversion program for your members. There is an enormous amount of work that must be done if the job is to be done correctly.

The first step that we would need is to have the Society write a letter to the Company stating that at a meeting of the Executive Committee it had been decided to transfer the endorsement from the Rupert & Lutz Agency to the Charles J. Sellers Agency. Armed with this endorsement, we could then, I am quite certain, negotiate with Pete Rupert an amicable sale of his interest in the Group.

Lest you think that this would be establishing a precedent, i.e., the transfer of Groups, I am attaching a list of Groups which our Agency has purchased in the last two years. In most of these cases our intervention took place at the request of the Company because of a deteriorating loss ratio situation.

Frankly, Dr. Hamilton, I do not think we would be hurting Peter Rupert in the long run if we force the sale of Monroe Medical by his Agency through transfer of endorsement. He will,

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

if this is done, receive a fair price for his interest. If the Group deteriorates to the point where it cannot be salvaged, he, obviously, would receive nothing. Many years ago when the Society had a monoply on the sale of disability insurance, the type of administration by Peter Rupert might have succeeded. Today, in the highly competitive Group market, I am forced to conclude that Pete is just unable to do the job. I know that you are interested in the protection of all of your members. I want to assist you. We can do the job if you act now. If you can wait too long, no one can.

Sincerely,
CHARLEY
s/ Charles J. Sellers Jr.

CJS, Jr/w

cc: Dr. Robert C. Webster, Pres.
Mr. Donald Irish, Exec. Director

[attachment omitted]

February 25, 1971

Mr. John Gaertner, Ass't Secretary
Group Health & Accident Division
The Continental Insurance Companies
80 Maiden Lane
New York, New York 10038

Dear John:

We agreed with both Bill Carroll and you that we would not try to transfer Monroe County Medical from Rupert & Lutz. We

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

would, instead, try to "keep peace in the family" and assist him to retain this business. We both, however, conditioned this upon the thought that if the Society were to start considering other companies, or terminating Mr. Rupert, then I would make an effort to retain the business in Continental Companies and request the Society to transfer endorsements.

I now must report to you that the situation has reached that point where the Society is seriously considering terminating Mr. Rupert's services. First, Dr. John G. Hamilton, who is Chairman of the Medical Economics Committee of the Medical Society of the County of Monroe, introduced this possibility because of the threatened *cancellation* in Pete Rupert's letter of January 26, 1971. He thought the Society was going to have to look for a new carrier.

On February 10, 1971, Pete Rupert wrote another letter which tried to impose an "automatic" compulsory conversion on the Society at, of all things, a 63% loss ratio.

Please remember, Don Irish and his Officers, and Committee Chairmen, are not idiots. They can do basic arithmetic. With a 15% renewal commission and a 63% loss ratio, the Company has a 22 point spread. I know the Company would be delighted if the overall book were capable of generating this much profit.

Despite the Society and you, both, telling Rupert to eliminate his "Trojan Horse", Mr. McKendry, he states in his February 10th letter that "*if* the Medical Society objects to this procedure, we will terminate this agreement". (emphasis supplied)

Most important, from the standpoint of the Doctors in Monroe Medical, is the fact that they are sufficiently astute to read be-

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

tween the lines and see that Rupert & Lutz really have no intention of trying to rescue the Group with sufficient new, young, risks to offset their mounting loss ratio. Rupert is being "forced" actually, to end the McKendry association. He does not have, in his own Agency, what is necessary to salvage this Group. If he did, would he even consider McKendry?

In my opinion, the Medical Society has more than ample grounds to terminate Rupert & Lutz. They have considered another carrier. Rupert has tried twice, unsuccessfully, to bluff them into compulsory rate increases; first, by threat of cancellation, and secondly with this 63% mandatory "automatic" conversion business.

It seems obvious to me, and it must also to the Medical Society, that Rupert & Lutz have let the situation deteriorate and that their solution is to let the Physicians be forced into paying much higher rates, either through the mandatory conversion of everyone, now, or in a few months by letting the loss ratio deteriorate further so as to force the new, substantially higher rates.

There was a time, years ago, when the County Medical Society enjoyed a monopoly in being the only source for a Physician to secure protection. At that time Rupert & Lutz could muddle through. In today's highly competitive market, it is obvious to me, and it must be to the Society, that Rupert & Lutz just can't "hack it". When Bob Lewis resigned as President because he couldn't get along with Peter Rupert, he told me that in his opinion the Agency would go to the dogs within a year because Peter did not have the ability to run the Agency. I am beginning to realize that Bob Lewis was quite a prophet.

APPENDIX B
Correspondence between Charles J. Sellers, Jr and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

I am writing this to you so that you will know how the situation is progressing and also so that you will know that if the Society decides to take action in transferring the endorsement, that such action will be predicated upon good and sufficient cause, not instigated by our office. The inadequacies of the Rupert & Lutz Agency as demonstrated by the reports and letters submitted by them to the Society, plus the two attempts to bluff the Society into mandatory rate increases will be the complete cause of this action by the Society.

The Officers and leaders of Monroe Medical Society will, in my opinion, not allow Mr. Rupert to "mouse trap" their members into these two or three hundred dollar rate increases.

I will keep you advised of developments.

Sincerely,
CHARLEY
s/ Charles J. Sellers, Jr.

CJS, Jr/w

cc: Mr. William Carroll, Secretary

November 30, 1971

Board of Directors
Monroe County Medical Society
1441 East Avenue
Rochester, New York 14610

Gentlemen:

We have been asked to comment on the Rupert & Lutz dismissal. If reinstatement of Rupert & Lutz is now being

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

considered, he has undoubtedly charged us with bad faith, using undue influence as an advisor to the Society or something similar. Endorsement by the Society implies to the membership a reasonable expectation of competence and integrity by the endorsed administrator. We ask you to judge for yourself by reading various EXHIBITS attached.

I was not without error in this matter myself. I had assumed that my thirty (30) years of dealing with the profession would insulate me from anyone believing what I assume to be charges of misrepresentation, etc. Moreover, I had no idea of just exactly how badly the M.C.M.S. group plan had deteriorated. When I was asked for help, I agreed to give it without charge, although we could have done so merely by assigning the matter to an associate on our staff who is a registered consultant. (Please see copy of Insurance Dept. letter re our Mr. Woelfle, EXHIBIT C.)

RE: SELLERS & CO. SELECTION AS ADVISOR

Why me? Was an error made in asking me for help? I think both Don Irish and Dr. Hamilton knew we insured the same physicians as Rupert on identical contracts at the same rates through the Seventh District M.S.S.N.Y. in a sister company of Commercial, the Fidelity and Casualty of N.Y. The F. & C., (Seventh District) and Commercial, (Monroe County Medical), are both owned by Continental Cos. of N.Y. The fact that Rupert was trying to force rate increases on Monroe physicians brought up the question of how to explain this when Sellers & Co. identical coverage in the Seventh District was not trying to coerce the same doctors into paying more money. Another factor — I think Don or Dr. Hamilton knew that I was the principal architect of the Guaranteed Renewable contracts for Continental Cos. This may have also influenced the choice. I mention these

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

aspects because I believe Peter Rupert still thinks to this day that the Society had no business asking me for help when in fact they probably had every reason to ask me in preference to any other source for advice and assistance.

At the time I agreed to help, I had no intention or expectation of replacing Rupert. I did have a personal concern over what effect any failure of M.C.M.S. group might have on our groups in the same or contiguous areas among the very same physicians. I felt we had parallel rather than conflicting interests. At the time I felt merely keeping the physicians' interests paramount would eliminate any charge of bad faith.

RE: RUPERT'S THREATS AND ATTEMPTS TO INTIMIDATE

When I was first asked to assist, Dr. Hamilton and Don Irish told me that Peter was attempting to force increases in rates on the older physicians. Both Don and Dr. Hamilton were most reluctant to coerce over one hundred (100) physician members into substantial rate increases, loss of benefits, either or both. Please see Rupert's Report, Dec. 11, 1970, EXHIBIT I, Page 4, where marked in red RE: "Drawbacks" to his own proposal.

I was told Peter's verbal threats of refusing to renew the old group cancellable policies did *NOT* at that time include the thought that the threatened physicians would be given a last chance to enroll in guaranteed renewable. Peter tried at a later date to rewrite the record and claim his threats and attempts to intimidate were only threats to force conversion. This was definitely *NOT* the situation related to me originally. Please see Peter's letter, EXHIBIT A, 26 January 1971, Par. #5.

My advice to Don Irish and to Dr. Hamilton was that I was equally incredulous that the Company had ever authorized

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

Rupert's threats. The record will show that Rupert was wrong and that we were right in our assessment. The Company confirmed in writing in Ass't Sec'y Gaertner's subsequent letter by stating that Peter Rupert's error should be attributed to "an excess of zeal" which caused him to attempt to force what he, Peter, thought was good for the Society. Please EXHIBIT D, letter John Gaertner March 2, 1971.

By now I had seen and read Rupert's December 11th report. I almost swallowed my teeth. The report, in my opinion, displayed such a complete lack of knowledge about Medical Society Group Disability Insurance in general and the M.C.M.S. situation in particular that I knew it was going to be extremely difficult to straighten out the "mess" that Peter himself alludes to in his own report EXHIBIT I, Page 2, and again on Page 4, marked in green.

RE: ATTEMPTING TO HELP PETER

In responding to the Society request to eliminate Mr. McKendry and ask the Company for assurances of a last chance for physicians to convert if the optional program didn't work out, Peter responded with three thoughts, (1) "the company will give no such assurances that the old contracts will not be cancelled" .... and (2) "Clifford McKendry is a past president of the Rochester Life Mgrs. Ass'n" .... and incredibly (3) "you might even be more interested in that he is also the area representative for NARRY (he meant N.A.R.I.) and a couple of other Physicians Associations." ... and more — Page 2, Par. 1, "May we again emphasize that all plans, not endorsed by your Society will be labeled as such. Therefore, the physician will be able to differentiate." Please see McKendry, N.A.R.I., Physicians Planning Service Corporation, Exhibit E attached.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

RE: DETERIORATING LOSS RATIO M.C.M.S.

I learned that M.C.M.S. claims payments including reserves had already soared over 100%. Since insurance company expenses, claims handling expenses, special premium taxes, agency commission, etc., all had to be added to the 100% paid and incurred, it was obvious that the M.C.M.S. Group Plan had deteriorated rather badly commencing about the time Peter assumed the helm at Rupert & Lutz.

Stripped of all insurance language about voluntary and involuntary, compulsory and mandatory conversion programs, Peter was trying to force the Society into coercing the older members to pay higher rates. There were over 100 of these older physicians and most of them would be "boxed in" since they could not obtain replacement coverage either at all or at a rate anywhere near the one they were currently paying. Dr. Hamilton and Don Irish, in my opinion, quite correctly foresaw the possibility of considerable animosity being generated among the older members of the Society unless a solution were found.

Another question that might well have been asked was "If the Society consented to coerce the older members, what was the answer when these members asked why Rupert raised the rates for Monroe while Sellers in the Seventh District did not?" Policies and rates were identical. Peter wanted that cheap solution — Blanket Rewrite — no salesmen — no applications — little or no cost to Agency.

My recommendation instead was to go to work, roll up your sleeves and try to convince all the physicians of the advantages of guaranteed renewable coverage. If you could win back support to the County Society Program of all the young, healthy

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

members not then participating, and additionally, sell larger amounts to the then participating young, healthy members, it was well within the realm of possibility that none of the older physicians would have to be blackjacked with heavy rate increases. This, by the way, *is the situation we now have in effect* and it cost Charles J. Sellers & Co., Inc. about Fifty Thousand Dollars ($50,000.00) to date to achieve it. Not all of this expenditure would have been necessary had we been able to purchase Rupert's records and his cooperation.

One may well ask, "If this were the best method, why didn't Peter do it?" I believe the problem may have been money. In order to put Peter in the Captain's chair at Rupert & Lutz, Lutz' stock had to be paid for. It is well known that Bill Lutz receives $1,000.00 a month for ten years ($120,000.00) *out of after-tax-income.* Bob Lewis, the former President of the company also had to be bought out. He demanded and received a large immediate cash payment plus a series of promissory notes. These obligations, plus bank interest and financing to pay the lump sum to Lewis, undoubtedly put heavy demands upon the Corporate income.

Since our Agency is almost 100% Professional Group, we have an enormous amount of automation within our firm. Additionally, we could put six highly trained service representatives into a situation of this sort and because of our already owning all the data processing files for Seventh District members (also M.C.M.S. members), we estimated a rescue operation could probably be conducted by us at a cost of about $30,000.00. Without the equipment I frankly don't know what the cost would have been. Without the staff I don't think the job could have been done.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

At first I did not realize that perhaps it was not going to be possible to salvage the situation by heading Peter in the right direction and having him follow through. Both the Society and the Company told Peter to drop the McKendry connection. Ass't Sec'y John Gaertner bailed him out with his March 2nd, '71 letter claiming Peter's threats were due to an excess of zeal in trying to force the Society to do what he, Peter, thought was best. The second part of this letter, EXHIBIT D, clearly points out the Company had secured Peter's agreement to drop McKendry. For why this was done, please see George Arden, N.A.R.I., Physicians Planning Service Corp., McKendry file, EXHIBIT E.

After all this, however, Peter still took the position that the Society should still coerce the older members. He persistently tried to keep this McKendry connection open, but reluctantly agreed to sever the relationship if the Society persisted in not wanting him to continue it. Please see Peter's letter dated February 10, 1971, EXHIBIT F. Please note that Peter is again emphasizing the so-called 60-69 rate break. It started to appear that Peter couldn't or wouldn't be directed by the Company or the Society.

RE: THE 60-69 RATE BREAK

The 60-69 rate break in our view was illusory relative to the existing rate table. When the Guaranteed Renewable contract was introduced by Continental, a much steeper age-rate gradient was employed. The rationale was to compete for the younger members with lower rates at younger ages. This necessitated higher rates at higher ages. These considerations caused the 50-59 rate under the NEW Guaranteed Renewable form to be higher than the OLD rate at ages 60-69. In short, each age group under the new program was going to pay their own freight. The

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

60-69 year old Doctor had subsidized his older colleagues when he was 40-49. It seemed unfair now to demand that he pay his own freight since competition had removed the support of the younger members by competitive step rate systems when his turn arrived. We felt that it was a hoax to tell the older physician that he was being given a real break when, in fact, the 50-59 New rates were higher than he was then paying.

When I saw the final threat by Peter about the sixty-three per cent (63%) loss ratio, I knew the die was cast. In essence Peter wrote that if the loss ratio reached 63% the Company would force mandatory conversion. This was on a group where the paid and incurred losses were then currently *OVER 100%.* This statement was so incredible that I think it was the final straw that broke the camel's back.

At this point it was obvious to all concerned that the only way to salvage the situation was for the Society to end Rupert. When asked if I could salvage it I replied that I could but to accomplish this it would probably be necessary to advise the Company that this determination to protect the members of the Society by replacing Rupert would even extend to changing companies if such were to become necessary.

RE: PAST VS. PRESENT

Twenty-five years ago Medical Societies enjoyed a near monopoly in the United States in providing group plan disability insurance. In that era any insurance agent could get by, no matter how inept. Physicians needed the coverage. The Medical Society was the only source of a "group plan". The group plan gave a cost discount of about 50% compared to individual policies. Keeping the group loss ratio within permissible limits on a "monopoly" basis was an easy matter.

APPENDIX B

Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

Many Society groups were placed with agents merely because they had an influential friend or two in the Society. No great harm was done if the administrator was so chosen or even retained on this basis. New young healthy risks came to the agent. He was not required to sell the plan competitively. Thus, almost any agent could be a successful Professional Group Plan Administrator.

That day has long since gone. Today we are in a great big competitive market place. Almost every Medical Specialty has a competing endorsed program. The College of Surgeons, College of Physicians, Academy of General Practice and almost all Specialty Groups now have competing programs, Even the A.M.A. has entered the disability field. Some people have even accused insurance agents (Arden) of organizing professional associations (N.A.R.I.; National Association of Physicians and Surgeons; American Professional Practice Association) primarily to sell insurance.

In our opinion, a Society today that seeks to retain an inadequate professional group administrator is headed for serious trouble with its group plan. This trouble will generally be clearly expressed by a deteriorating loss ratio. This will inevitably cause increasing costs of insurance for some of the older members, decreases in benefits for some of the older members, either or both. It has caused many non-renewal cancellations.

RE: WHY THE MEDICAL ECONOMICS COMMITTEE ACTED

We believe it was this consideration for the insured physicians which compelled Dr. John Hamilton as Chairman of the Medical Economics Committee to recommend removal of Rupert. It is

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

opinion on my part perhaps, but I think Dr. Hamilton's decision was an unpleasant one. He must have known that Rupert had friends in the Society who would resent this action. No one likes to fire an employee. No one likes to sever a relationship of many years. When, however, authority is given to a Chairman of an important Society Committee to act in behalf of his colleagues, he obviously has a duty to do so. He must face up to his responsibility and act to protect his fellow physicians. Rupert's removal, in our opinion, was not due to one, two, or even three causes. It was an overwhelming parade of problems which ultimately forced the action.

For the record, I should like to state that at all times Dr. Hamilton and Mr. Irish and Dr. Webster have demanded proof, facts, and documentation to support every statement or advice we have given. No decision was arrived at by shooting from the hip. It was only the most compelling reasons that after careful study and deep deliberation forced the inescapable conclusion, we believe, that Mr. Rupert had to go. The first consideration, in our opinion, was the physicians and the Society itself.

Reinstating Rupert would mean removing us. We spent a fortune ($50,000.00) extricating M.C.M.S. from its difficulties. We contacted all insureds and obtained new applications, sometimes after repeated call backs. After we had done all the work so that *no one was forced into any rate increases*, it would seem ironic if Peter were reinstated. Our costs were increased considerably, incidentally, by all the obstructive tactics that Rupert directed against the new Society Program.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

RE: FRESH START M.C.M.S. NEW GROUP SELLERS & CO., INC.

One more thought; when M.C.M.S. was cancelled and rewritten there were many long-term claimants drawing benefits. These claims are now being posted against the Rupert & Lutz Agency account since that agency initiated them. M.C.M.S. with Charles J. Sellers & Co., Inc., starts with a zero claim base. To again cancel all the policies, which would be necessary in order to reinstate Rupert, would make the Society look ridiculous and just about destroy the Group Plan. It might also give the Company a good talking point for recharging the current payments for the long-term losses against M.C.M.S. if Rupert were the administrator. This could be a tragic blunder of monumental proportions. It would, undoubtedly, in time, lead back to the problems Rupert produced in the past.

We view the Society endorsed Insurance to be in the nature of a partnership between the Society, the Company, and our Agency. In order to live in today's highly competitive world we, frankly, must have the full, complete and undivided support of the Society if we are to keep the coverage in force for your older members. We believe Peter Rupert and Dick Gates have had ample opportunity to state their case. They have even had a special meeting called when they wrote a letter, June 23, 1971, attacking the Medical Society Administration. (Please see EXHIBIT G.)

It still rankles me personally that at one of these meetings someone implied that I submitted Bulletin copy stating we had replaced Rupert & Lutz ahead of the date that the Executive Committee reached the decision. This completely unjustified accusation not only attacks me, it also inferentially compromises

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

the integrity of the Bulletin Staff, or even the Executive Committee, either or both, as well as myself. It is completely unfounded and most unfair to all concerned. It is not unusual when purchasing a full page to ask and receive a day or two delay in submitting copy if you guarantee the full page purchase.

We think it is high time that Rupert & Lutz are told firmly that they have lost the account, and that they are not going to be reinstated. The unsettled condition as to who will be administrator, the false accusations and the vituperation keep many younger members from enrolling. Merely giving credence to Peter's wild rantings impedes the the support we must have in the program if we are to continue to accomplish a sound, viable Society Group Plan insuring protection for all members. We would ask that the Society get behind its own program for its own members, tell Peter he is out of the picture permanently and to cease and desist his constant attempts to return by attacking the Society, the Group Plan, and our office as Administrators.

Sincerely,

CHARLES J. SELLERS & CO., INC.
s/ Charles J. Sellers, Jr.

CJS, Jr/cm
Encl.

P.S. While we have documented our comments with letters and other exhibits, we wonder if Rupert's charges are similarly supported by anything other than his own statements.

[Enclosures omitted]